No. 82-118

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REASONS FOR GRANTING THE WRIT

1. THE DECISION IN THE PRESENT CASE ALSO DIRECTLY CONFLICTS WITH AN OPINION RECENTLY ISSUED BY THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

On July 14, 1982 the United States Court of Appeals for the Ninth Circuit issued an opinion in the case of *Pavlak v.*

Church, 681 F.2d 617 (9th Cir. 1982) which directly conflicts with the decision of the United States Court of Appeals for the Fourth Circuit in the present case. In *Pavlak*, the court stated the legal issue in essentially the same terms as the Fourth Circuit: "[t]he question here is whether, after certification of a Rule 23(b)(3) class is denied, a plaintiff, who was a member of the putative class, may claim that the statute of limitations was tolled pending determination of the certification motion so that she may file an independent suit." *Id.* at 617-18. However, the Ninth Circuit, following the Second Circuit, concluded that the statute of limitations was not tolled during the pendency of a proposed class action for purposes of permitting a putative class member to file a timely independent suit. *Id.* at 618. In so doing, the Ninth Circuit unequivocally joined the Second Circuit in a legal position diametrically opposed to that established by the Fourth Circuit in the present case.

Although *Pavlak* did not cite the Fourth Circuit's opinion in the present case, the existing conflict among the circuits is apparent and certainly unsettling. The *Pavlak* court noted:

> Our resolution of this case follows that of the Second Circuit in *Stull v. Bayard*, 561 F.2d 429, 433 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S. Ct. 769, 54 L. Ed. 2d 783 (1978), *aff'g*, 424 F. Supp. 937, 941-43 (S.D.N.Y. 1977). The District of Columbia Circuit, in *Wachovia Bank and Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980) (alternative reason), *cert. denied*, 452 U.S. 954, 101 S. Ct. 3098, 69 L. Ed. 2d 965 (1981), expressed a consistent view. We are aware of the contrary suggestion in *Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978), *vacated for reconsideration*, 445 U.S. 940, 100 S. Ct. 1334, 63 L. Ed. 2d 773 (1980). Even assuming the Fifth Circuit would reach the suggested conclusion were the issue squarely presented, we agree with the resolution

> reached by the Second Circuit, for reasons expressed in this opinion.

Id. at 621. In its opinion, the Fourth Circuit also recognized the conflicting positions, and couched its conclusion in the following fashion: "[w]ith due respect to the views of the Second Circuit, we think that *American Pipe* should be read to toll limitations with respect to a new suit as well as to a motion to intervene." *Parker v. Crown, Cork & Seal Co.*, 677 F.2d 391, 393 (4th Cir. 1982).

In the present case, the Fourth Circuit relied heavily upon a footnote in the case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13, 94 S. Ct. 2140, 2152 n.13, 40 L. Ed. 2d 732, 748 n.13 (1974), as authority for the proposition that the commencement of a class action tolls the applicable statute of limitations as to all members of the class. *See Parker v. Crown, Cork & Seal Co.*, 677 F.2d at 393. However, the *Pavlak* court specifically rejected that footnote as controlling authority.

> We do not read it [footnote 13], however, as effecting a drastic expansion of *American Pipe* beyond the solid equities of its factual underpinnings. The footnote seems to allow a class member who opts out at the time of receiving notice of the institution of a class action to commence his own separate suit. It does not, however, authorize tolling of the statute of limitations for those who file separate actions at the time of denial of class certification. That issue was not presented to the Court in *Eisen*.

681 F.2d at 620-21.

It is submitted that the *Pavlak* opinion clearly illustrates the substantive and continuing conflict among the circuits involving an important matter of judicial administration. This disparity of views rests squarely upon

appellate interpretations of Supreme Court decisions which can be resolved only by this Court. Once again, the far-reaching implications of a decision in the present case require this Court's consideration.

Respectfully submitted,

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